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Malayan Banking Bhd v KM Music Lines Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–274–01 OF 2012
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
16 JUNE 2015

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Civil Procedure — Judgment — Failure of trial court to deal with merits of case — Whether decision flawed — Whether reasons for various conclusions in grounds of judgment unexplained — Whether judicial discretion should be exercised to allow application for adjournment of hearing if refusal would result in denial of justice and be fatal to applicant's case — Whether rules of pleading should not be applied to shut out party from making its case

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The dispute between the parties in the instant appeal concerned a cheque for RM193,436.65 crossed as 'A/C payee — not negotiable' issued by a bank to the respondent which allegedly never reached the respondent's hands but was instead paid into the account of another company ('OKA') by the appellant ('MBB') as the collecting bank. The respondent sued MBB in the High Court for the value of the cheque together with interest and costs both on the basis of wrongful conversion of the cheque as well as for monies had and received. MBB, however, contended in its defence that the respondent's director cum shareholder ('SP1') came to its branch with the cheque and requested the branch manager to bank it into OKA's account apparently because a debt OKA owed the respondent had been settled. At the trial, SP1 denied that the signature on the back of the cheque authorising payment to OKA was his. He had also testified that if the cheque had been paid into the respondent's account, the respondent would not have been wound up nor would its two shareholders have become bankrupts. In the course of the trial, MBB applied on the evening before an adjourned trial date for a postponement of the hearing because its expert (and main) witness was engaged in a hearing in another court. The High Court denied the adjournment because of the lateness of the application. The consequence was fatal to MBB as the trial court in granting judgment against it held, inter alia, that MBB failed to call an expert witness to prove that the signature on the back of the cheque belonged to SP1 and also to rebut the testimony of the respondent's expert witness. The trial court also invoked adverse inference against MBB on its failure to produce an original document and further ruled that it could not submit on facts it had not pleaded. The instant appeal was against the High Court's decision.

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Held, allowing the appeal and setting aside the High Court's decision with costs of RM15,000:

(1) The High Court's decision was flawed for various reasons. The matter was not dealt with on its merits. In drawing an adverse inference against the appellant, the trial court had held there was suppression of evidence, yet it was not explained how that conclusion was arrived at. Similarly, no explanation was given why SD2's testimony could not be relied upon or why SD1's should be doubted. The court failed to see the relevance of who typed the words 'please pay to OKA Concrete' on the cheque or the spelling error in SP1's name (see paras 14–16).

(2) Judicial discretion ought to be exercised in dealing with requests for postponements by inquiring not only into the reasons but also who, if any, was at fault or whether it was beyond anybody's control. To discourage postponements, the party at fault should be punished with costs. But to deny a party from calling its main witness was denying justice. The denial to call the main witness in this case prevented the appellant from proving its defence and from satisfying the court upon balance of probabilities that the signature on the back of the cheque was that of SP1 and to contradict the testimony of the respondent's forensic document examiner, SP2 (see paras 8 & 10).

(3) The rules of pleadings should not be applied to shut out a party from making its case or its defence. Further relevant facts or issues of fact might emerge before a case was concluded, and if both parties were able to deal with such issues, with time being given if necessary, then that it was not pleaded should not become a tool to shut out justice on the merits. Similarly, any question of law should be allowed to be dealt with so long as the facts upon which the question was founded was on the record (see para 13).

[Bahasa Malaysia summary

Pertikaian di antara pihak-pihak dalam rayuan ini adalah berkaitan cek untuk sejumlah RM193,436.65 dipalang sebagai 'A/C payee — not negotiable' dikeluarkan oleh bank kepada responden yang mana didakwa tidak pernah sampai ke tangan tetapi sebaliknya dibayar ke dalam akaun syarikat lain ('OKA') oleh perayu ('MBB') sebagai bank pengutip. Responden menyaman MBB di Mahkamah Tinggi bagi nilai cek bersama faedah dan kos kedua-duanya atas asas penukaran salah cek dan juga untuk wang yang ada dan diterima. MBB, walau bagaimanapun, berhujah dalam pembelaannya bahawa pengarah merangkap pemegang saham responden ('SP1') datang ke cawangannya dengan cek dan meminta pengurus cawangan dengan nyata untuk membayarnya ke dalam akaun OKA kerana hutang yang kena dibayar oleh OKA kepada responden telah diselesaikan. Semasa perbicaraan, SP1 menafikan bahawa tandatangan atas belakang cek memberi kebenaran bayaran

kepada OKA adalah kepunyaanya. Dia juga memberi keterangan bahawa jika cek telah dibayar ke dalam akaun responden, responden tidak akan digulung ataupun dua pemegang sahamnya menjadi bankrap. Dalam perjalanan perbicaraan, MBB memohon pada sebelah petang sebelum tarikh perbicaraan yang ditangguh untuk penangguhan pendengaran kerana pakarnya dan saksi utama adalah dalam pendengaran di mahkamah lain. Mahkamah Tinggi menafikan penangguhan tersebut kerana kelewatan permohonan tersebut. Akibatnya adalah tidak dapat dielakkan kepada MBB kerana mahkamah perbicaraan dalam memberikan penghakiman terhadapnya, ia memutuskan, antara lain, bahawa MBB gagal untuk memanggil saksi pakar untuk membuktikan bahawa tandatangan atas belakang cek dimiliki oleh SP1 dan juga untuk mematahkan keterangan saksi pakar responden. Mahkamah perbicaraan juga membangkitkan inferens bertentangan terhadap MBB atas kegagalannya untuk mengemukakan dokumen asal dan selanjutnya memutuskan bahawa ia tidak dapat memasukkan atas fakta yang ia tidak diplidkan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos sebanyak RM15,000:

(1) Keputusan Mahkamah Tinggi adalah cacat untuk pelbagai sebab. Perkara tidak diuruskan atas meritnya. Dalam membangkitkan inferens bertentangan terhadap perayu, mahkamah perbicaraan telah memutuskan bahawa terdapat penyembunyian keterangan, tetapi ia tidak menjelaskan bagaimana kesimpulan tersebut dicapai. Sama juga, tiada penjelasan diberikan mengapa keterangan SD2 tidak boleh digunakan atau mengapa SD1 patut diragui. Mahkamah gagal untuk melihat perkaitan terhadap siapa yang menaip perkatan-perkataan 'please pay to OKA Concrete' atas cek atau kesilapan ejaan dalam nama SP1 (lihat perenggan 14–16).

(2) Budi bicara kehakiman patut dilaksanakan dalam menguruskan dengan permintaan bagi penangguhan dengan menyiasat bukan sahaja ke dalam alasan tetapi juga siapa, jika ada, adalah salah atau sama ada ia di luar kawalan sesiapa pun. Untuk tidak menggalakkan penangguhan, pihak yang bersalah patut dihukum dengan kos. Tetapi untuk menafikan pihak daripada memanggil saksi utamanya adalah menafikan keadilan. Penafian untuk memanggil saksi utama dalam kes ini menghalang perayu daripada membuktikan pembelaannya dan daripada memuaskan mahkamah atas imbangan kebarangkalian bahawa tandatangan atas belakang cek adalah tandatangan SP1 dan untuk menyangkal keterangan pemeriksa dokumen forensik responden, SP2 (lihat perenggan 8 & 10).

(3) Peraturan pliding tidak patut diguna pakai untuk menghalang pihak daripada membuat kesnya atau pembelaannya. Selanjutnya fakta relevan atau isu fakta mungkin akan berbangkit sebelum kes disimpulkan, dan

jika kedua-dua pihak boleh menguruskan isu-isu sedemikian, dengan masa yang diberi jika perlu, dengan itu apa yang tidak diplidkan tidak patut menjadi alat untuk menutup keadilan atas merit. Sama juga, apa-apa soalan undang-undang patut dibenarkan untuk diuruskan asalkan fakta atas mana soalan didasarkan adalah berada dalam rekod (lihat perenggan 13).]

Notes

For cases on judgment in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 4847–5143.

Appeal from: Civil Suit No (3)22–123 of 2013 (High Court, Ipoh)

Lim Ta Wai (Khong & Son) for the appellant.
Kerpal Singh (Jagjit Kerpal & Sakthi) for the respondent.

Abdul Wahab Patail JCA:

[1] The defendant, Malayan Banking Bhd ('the appellant') appealed against the decision of the High Court made on 29 October 2010 to allow the claim by the plaintiff, KM Music Lines Sdn Bhd (in liquidation) ('the respondent') in part to pay to the respondent the sum of RM193,436.65 with interest thereon at 8% from the date of judgment until final settlement, and costs to be taxed.

BACKGROUND

[2] The agreed facts and defence as summed up by the High Court are as follows:

3. Fakta kes yang disetujui menunjukkan Kewangan Bersatu Bhd ada mengeluarkan cek Chung Khiaw Bank (M) Bhd No 85449 bertarikh 11 Januari 1996 atas nama Kum Mei Sdn Bhd (nama plaintif yang dulunya). Cek tersebut adalah berpalang dengan status 'account payee — not negotiable'. Cek tersebut tidak pun sampai ke tangan plaintif yang sepatutnya tapi telah diserahkan kepada SD2 iaitu Managing Director OKA Concrete Industries Sdn Bhd ('OKA') yang merupakan pemohon kepada kemudahan pinjaman kepada Kewangan Bersatu Bhd. Terbit dari permohonan inilah cek itu dikeluarkan. Cek itu telah dimasuk ke dalam akaun OKA oleh pihak bank defendan.

4. Pembelaan defendan di dalam penyataan pembelaannya adalah seperti di para 3 iaitu menurut versi pihak defendan iaitu wakil plaintif SP2 telah meminta defendan untuk memasukkan nilai cek tersebut ke dalam akaun OKA atas alasan hutang antara OKA dan plaintif telah diselesaikan.

THE PLEADED CASE

[3] The respondent had pleaded as follows:

A 6. In or about March 2000, Plaintiff came to know that Kewangan Bersatu Berhad Cawangan Ipoh had issued Chung Khiaw Bank (Malaysia) Bhd cheque No. 854409 for RM193,436.65 in the name of the Plaintiff and crossed 'A/C Payee – not negotiable' and that this cheque was paid into the account of OKA by Defendant as the collecting bank.

B 7. In the circumstances, the Defendants have converted the said cheque to their own use and wrongfully deprive the Plaintiff of the same whereby the Plaintiff has suffered damage.

8. Alternatively, the said sum of RM193,436.65 is payable to the Plaintiff by the Defendants as moneys had and received by the Defendants to the Plaintiff's use.

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[4] The appellant's defence was as follows:

2. Defendan menafikan perenggan 6, 7 dan 8 dalam Penyataan Tuntutan tersebut.

3. Sebaliknya, pada lebih-kurang 11-1-1996, wakil Plaintif, yang memperkenalkan
D dirinya sebagai K T Ong, telah menghadiri pejabat cawangan Defendan di Pasir Puteh dan memberi cek No. 854409 tersebut kepada pengurus cawangan Defendan lalu meminta Defendan memasukkan cek tersebut ke dalam akaun OKA Concrete Industries Sdn. Bhd. (OKA).

E **[5]** The role of OKA was referred to in the respondent's statement of claim as follows:

4. At all material times, Plaintiff had relations with OKA Concrete Industries Sdn Bhd (OKA) wherein the said OKA owed Plaintiff RM200,000.00 as at 11/1/96.

5. To settle the said debt, OKA represented that they would obtain a loan/financial
F facilities from Kewangan Bersatu Berhad, cawangan Ipoh.

[6] Ong Teng Kat, a director and shareholder of the respondent had denied that the signature on the cheque authorising payment to OKA was his. The
G seriousness as to into which account the cheque for RM193,436.65 was paid is evident from the testimony of Ong Teng Kat:

> 21 Q: What were the consequences of the cheque not having been paid into Plaintiff's account?
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> A: Had it been paid into Plaintiff's account, Plaintiff would not have been
H wound-up, and the two shareholders would not have been adjudged bankrupts.
>
> Plaintiff was unable to sustain business because of cash-flow problems, and the two shareholders have suffered mental stress and humiliation.

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THE HIGH COURT GROUNDS

Re postponement

[7] The appellant had in late afternoon of 12 October 2010 sought an adjournment of the continued hearing on 13 October 2010 on the grounds that the appellant's expert witness, their main witness was involved in the Kuala Lumpur Industrial Court between 11–13 October 2010. The High Court said:

> 1. Perbicaraan penuh kes ini telah bermula pada 11 Ogos 2010 dan disambung pada 9 September 2010 serta pada 13 Oktober 2010. Pada 12 Oktober 2010 lebih kurang jam 5 petang saya telah menerima surat daripada peguamcara defendan bertarikh hari yang sama memohon penangguhan atas saksi utama defendan iaitu pakar terlibat di Mahkamah Perusahaan Kuala Lumpur dari 11–13 Oktober 2010. Pemohonan saat akhir ini telah tidak dibenarkan kerana peguamcara defendan mereka mempunyai masa memohon lebih awal selepas kes ditangguh pada 9 September 2010 dimana pada tarikh tersebut kes ini semata-mata ditangguh kerana dua saksi defendan tidak hadir termasuk saksi pakar ini. Mahkamah telah tangguh kes pukul 10.30 pagi. Jika permohonan dibuat lebih awal dan mahkamah tidak benarkannya, saya percaya peguam defendan akan mempunyai masa untuk mengutamakan saksi pakar ini untuk hadir di Mahkamah ini, mungkin 1/2 hari pada 13 Oktober 2010 setelah dua hari terlibat di Mahkamah Perusahaan.

[8] The problem of postponements being sought at the last minute occurs more often than is desired. But that is not to say it happens every day or too often. But it is not always the fault of anyone or one party or another. The judicial discretion ought to be exercised judicially, by inquiring not only into the reasons but also who, if any, is at fault or was it beyond anybody's control. To discourage postponements, the party at fault should be punished with costs. But to deny a party from calling its main witness, is denying justice.

[9] The consequence of this was fatal to the appellant's defence, as is evident from para 7 of the grounds of judgment of the High Court where it was held:

> 7. Oleh kerana defendan tidak pertikai jumlah cek tersebut telah dimasuk ke akaun OKA maka pada hemat saya beban adalah kepada defendan untuk membuktikan beliau telah diberi kebenaran SP2 untuk berbuat demikian. Pada hemat saya ini gagal dilakukan defendan.
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> Alasan-alasan adalah seperti berikut:
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> (a) Defendan telah gagal membuktikan bahawa tandatangan dibelakang cek tersebut adalah tandatangan SP1.
>
> (b) Defendan telah gagal memanggil pakar mereka untuk membuktikan tandatangan tersebut kepunyaan SP1.

[10] The denial to call the main witness resulted in preventing the appellant from proving its defence. If the main witness could satisfy the court upon a balance of probabilities that the signature at the back of the cheque was that of SP1 Ong Teng Kat, and to contradict SP2 Pang Chan Kok William, the respondent's 'Forensic Document Examiner'.

Re not pleaded

[11] The High Court went on to say:

> 6. Adalah hujah defendan bahawa plaintif telah gagal membuktikan mereka adalah pemilik sebenar cek tersebut atas alasan cek itu tidak pernah diserahkan kepada plaintif. Dengan hormatnya isu ini tidak pernah diplidkan maka ianya tidak boleh dibangkitkan sebab pihak-pihak terikat dengan pliding. Jika pun Mahkamah hendak ditimbangkan isu ini seperti dalam kes *UMBC v Kek Tek Huat [deceased]* [1990] 1 MLJ 83 tunjukkan walaupun cek tidak pernah diserahkan kepada plaintif ini tidak bermakna ini melupuskan status plaintif sebagai pemunya sebenar cek tersebut dan beliau boleh mengambil tindakan terhadap defendan. ...

[12] The purpose of pleadings is (a) to give notice to the other party of the cause of action and the facts relied upon in respect thereof; (b) to enable the other party to determine what they dispute or do not dispute and by their statement of defence give notice accordingly to the plaintiff. When so notified as to what is disputed, the plaintiff follows up by disclosing the nature of the evidence relied upon in respect of the disputed fact, leaving it to the defendant to demand discovery and/or interrogatories if they so desire to check and verify the evidence. If they did not, then they are deemed to accept the evidence the nature of which was disclosed. The checking and verification determines which evidence are disputed and require to be tested before the court in a trial, otherwise the matter proceeds only to submissions. Applied in this manner, litigation once commenced could be brought to a conclusion expeditiously and economically.

[13] It is not the purpose that the rules of pleadings be applied to shut out a party from making its case or its defence. Further relevant facts or issues of fact may emerge before a case is concluded, and if both parties were able to deal with such issues, with time being given if necessary, then that it was not pleaded should not become a tool to shut out justice on the merits. Similarly, any question of law should be allowed to be dealt with so long as the facts the question is founded upon is on the record.

OTHER GROUNDS OF THE HIGH COURT

[14] The High Court listed its other reasons as follows:

3. SP2 iaitu pakar pihak plaintif telah hanya memberikan pendapatnya atas dasar hipotetikal kerana pihak defendan telah gagal mengemukakan dokumen asal walaupun diminta beberapa kali. Kegagalan defendan dalam mengemukakan dokumen asal ini telah membangkitkan inferens bertentangan di bawah s 114(g) Akta Keterangan kerana ini merupakan satu penekanan bukti.

4. Keterangan SD2 adalah tidak menyakinkan dan tidak boleh disandarkan.

5. Keterangan SD1 atas keadaan pengindosan cek tersebut adalah diragui. Beliau tidak mengambil salinan butiran kad pengenalan SP1 walaupun seorang banker yang berhemat akan berbuat demikian.

6. Adalah tidak jelas siapakah yang menaip perkataan 'please pay to OKA Concret' seperti yang tertera di cek tersebut.

7. Nama SP1 telah disilap eja pada cek tersebut.

8. Adalah aneh bila dikatakan pegawai dari Kewangan Bersatu Berhad telah memberikan cek tersebut kepada SD2 pada hal cek itu dikeluarkan atas nama plaintif.

9. Adalah amat tidak teratur apabila cek tersebut yang merupakan cek berpalang yang menghalang urus niaga telah dimasukkan oleh defendan ke dalam akaun pihak ketiga.

[15] In drawing an adverse inference, it was held that there was suppression of evidence, but it was not explained how the conclusion there was suppression of evidence was arrived at. Similarly, no explanation was given why the testimony of SD2 cannot be relied upon, or to doubt SD1. We did not see the relevance of who typed the words 'please pay to OKA Concrete' or spelling error.

[16] It was clear that the matter had not been dealt with on its merits and the decision was for the foregoing reasons flawed.

[17] We, therefore, allowed the appeal, set aside the order of the High Court, fixed costs in the sum of RM15,000 and ordered that the deposit be refunded.

Appeal allowed and the High Court's decision set aside with costs of RM15,000.

Reported by Ashok Kumar